STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
(Donofrio and Jansen, JJ., Saad, PJ., dissenting)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiffs-Appellant,

v

TERRY NUNLEY,
Defendants-Appellee,

and

ATTORNEY GENERAL,
Intervenor.
_____/

Supreme Court No. 144036

Court of Appeals No. 302181

Washtenaw Circuit Court
No. 10-001573-AR

REPLY BRIEF OF ATTORNEY GENERAL BILL SCHUETTE

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INTRODUCTION

The certification of mailing created to record the fact that Nunley had been sent notice that his driver license was suspended is not testimonial for two basic reasons: (1) any cross examination of Fred Bueter or the other staff member that performed the clerical acts of placing the notice in the mail and dating the certification would be a "hollow formality"; and (2) the document was established before there was any crime – its initial and ordinary purpose was administrative. There was no significant decisional action taken here. The certificate here is more closely analogous to the clerk's certification than it is to the certification of lab results, which requires special competence and adherence to precise protocols. Nunley essentially raises three arguments in support of his claim, and this Court should reject each of them.

First, Nunley argues that the cross-examination of Fred Bueter would yield significant inquiry about the "actions, observations, and procedures" used by the Secretary of State in creating these certificates of mailing. Nunley's Brief, p 32. He cites Bueter's affidavit as an example of the kind of information that cross would yield. But the affidavit supports the *opposite* conclusion. Bueter has no information about this certificate. His testimony would be no different than a custodian of records or that of the clerk describing how documents are maintained if required to support an authentication of records. The recording of such routine information – 850,000 documents each year – can only be captured by document.

Second, Nunley argues that the "sole" purpose of these certificates is to bring a criminal charge against someone. Not true. These certificates are created *before*

there was any crime, are created as a matter of routine, record the fact that the Secretary of State has maintained the notice as required by law, and in the overwhelming number of cases have no role in a later criminal prosecution. The Supreme Court in *Melendez-Diaz* specifically relied on the distinction between the "authenticat[ion]" and "creat[ion]" of a document, the very same distinction at issue here. *Melendez-Diaz v Massachusetts,* 129 S Ct 2527, 2539 (2009). There are administrative purposes and third-party uses for these certificates as well.

Third, and finally, Nunley argues that under *People v Fackelman,* 489 Mich 515, 556; 802 NW2d 552 (2011) it was "foreseeable" that this certificate would be used at a criminal trial. There are other public documents, for which it is foreseeable that they will be used for prosecution, e.g., birth certificate (victim's age for criminal sexual conduct) or marriage license (bigamy), but does not make the document testimonial. Nunley's argument ignores the distinction in *Melendez-Diaz* between *authenticating* and *creating* documents. Where this standard has applied, the evidence was created after the crime occurred. That is not true here.

ARGUMENT

I. The information in the certificate is just like a clerk's authentication, and the truth of the information cannot be meaningfully cross-examined.

Nunley contends that the information in the certificate of mailing is like the information contained in a lab certification and cites Bueter's affidavit. But the facts at issue here – placing the notice in the mail and dating the certificate – are exclusively ministerial functions.

A. Cross-examination is the chief mechanism for testing the truth of "testimonial" facts.

There is no dispute that cross examination is the "crucible" by which the reliability of testimonial evidence is tested. *Bullcoming v New Mexico,* 131 S Ct 2705, 2715 (2011), citing *Crawford v Washington,* 541 US 36, 62 (2004). The Supreme Court in *Melendez-Diaz* and *Bullcoming* explained why cross-examination would enable the defendant to test the evidence's reliability, resisting the conclusion that cross-examination of lab reports would be a "hollow formality." *Bullcoming,* 131 S Ct at 2716. See also *Melendez-Diaz,* 129 S Ct at 2536 ("assuring accurate forensic analysis"). The point, of course, is that where cross examination is meaningless, that is strong evidence that the statements at issue are non-testimonial.

Thus, the comparison to the clerk's authentication is really the controlling one. The action of authentication only certifies the correctness of the copy, but does not "certify to its substance." *Melendez-Diaz,* 129 S Ct at 2539. This same dynamic is in play here. The "substance" that is at issue is contained in the notification, which includes the information that Nunley was suspended because he was convicted of operating while impaired on June 2, 2009 in Chelsea, and had a prior operating while impaired on May 23, 2006 in Grand Blanc. See Joint Appendix, Certified Driving Record, pp 19a, 21a. That is the "substance."

In contrast, the statements at issue here are whether the Secretary of State sent that notice. Such information is analogous to the clerk's authentication, which certifies that (1) the document is a public one and (2) has been maintained by the

Secretary of State. There is no difference in the character of this information to the statements at issue, i.e., that (1) the notice was mailed and (2) the certificate was properly dated. It is routine information, created by the agency as a matter of its administrative processes, one of 850,000 such documents each year. The fact that the notice provision is one of the elements of the crime does not change the non-testimonial nature of the statements.

For example, suppose there was no notice requirement, but rather Michigan law specifically required that the Secretary of State maintain a certified driving record that the person is suspended under MCL 257.904 in order for a driver to be guilty of the crime if found to be driving. In that case, the clerk's certification of the driving record would satisfy an element of the crime. But such a fact would not transform the routine, non-testimonial certification, into testimony, *even if it were an essential element of the crime.*

A second example further confirms the point. Nunley concedes that a "machine cannot be cross-examined." Nunley's Brief, p 32. But the Secretary of State may well be able to establish that a process by which these last ministerial actions done by staff members – dating the certificates and placing the notices in the mail – could be accomplished by an automated process.[1] Given the volume of notices and certificates, this technological development is only a matter of time. This circumstance would constitute the exact scenario that *Bullcoming* concluded

[1] This would not satisfy MCL 257.212, which requires that a "person" accomplish the notice, but that is not the exclusive method by which proof may be demonstrated. The language of MCL 257.212 is permissive ("may").

was not present in which there was mere "machine-produced data." *Bullcoming,* 131 S Ct at 2714. This is indicative of the non-testimonial nature of these statements.

B. An examination of Bueter's affidavit supports this conclusion.

Nunley contends that Bueter's affidavit supports his argument because the information that is contained in this affidavit proves the usefulness of cross examination. It does just the opposite.

Like all other staff members of the Secretary of State, Bueter has no personal knowledge of Nunley's case. See Joint Appendix, Bueter's Affidavit, ¶ 11 ("Other than the processes described above, I do not have any personal knowledge as to any particular notice of license suspension or revocation, nor as to any particular certificate of mailing of the related notice"). Instead of testing the reliability about whether the Secretary of State accurately dated the certificate or really mailed the notice, this testimony would be the same as any custodian who can describe the processes of an agency or business for regularly conducted affairs. See, e.g., *United States v Weinstock,* 153 F 3d 272, 276 (CA 6, 1998). One of the reasons for allowing custodians under MRE 803(6) to testify to permit the admission of the exhibit is that no one would necessarily be able to testify about the particular document; that is the case here.

Nunley contends that the cross-examination would flush out the relevant "proficiency, the care he took in performing his work, and his veracity, and the machine's accuracy and repair." Nunley's Brief, p 31 (internal quotes omitted). But

the relevant cross-examination would be limited to asking staff members about their processes in placing the notices in the DTMB mail and signing the certificates of mailing. This is fundamentally different from the kind of questioning that may occur of a lab professional. See *Bullcoming,* 131 S Ct at 2714 ("these representations, relating to past events and human actions not revealed in raw, machine-produced data, are meet for cross-examination"). Instead, this is like a clerk confirming that the public body has maintained the document. See *Melendez-Diaz,* 129 S Ct at 2539 ("A clerk could by affidavit authenticate or provide a copy of an otherwise admissible record"). Like the evidence that was found to be non-testimonial by this Court many years ago in *People v Jones,* 24 Mich 215, 225 (1872), the evidence here was "essentially and purely documentary." It was not testimonial.

II. There is a fundamental difference between the creation of a document and the certification of an extant document as proof of a crime.

Nunley does not squarely address the point that the notices here are sent, and the certificates of mailing are created, *before* there is any crime. Rather, the notification is intended to prevent a crime from occurring. Instead, Nunley focuses on his claim that the "only" or "primary" purpose of these certificates is their use for criminal prosecution later. See Nunley's Brief, pp 21, 24. But the fact that these documents are created as a routine administrative matter, capturing ministerial information, before there is any crime, is dispositive. They are not testimonial.

A. The Supreme Court relied on this critical distinction between the creation of a new document for prosecution purposes and certifying an extant document.

The other aspect of the Supreme Court's analysis carved out an exception for a clerk's authentication, which identifies an existing document:

> A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant. [*Melendez-Diaz,* 129 S Ct at 2539 (emphasis in original).]

This is consistent with this Court's analysis in *People v Goodrode,* 132 Mich 542; 94 NW 14 (1903), approvingly cited in *Melendez-Diaz,* 129 S Ct at 2539, which distinguished between the Secretary of State certifying an existing document and a certificate that there was no existing document after a search. *Goodrode,* at 547.

This distinction is a logical one. At the time that the certificate of mailing was generated, there was no crime. Indeed, the certificate records the notice, which itself is designed to *prevent* a crime from occurring. The dissent in *Nunley* in the Court of Appeals made this same point. *People v Nunley,* slip op, p 4 (Saad, J. dissenting). Nunley argues that this "conflates" the notice with the certificate. Nunley Brief, p 24. But this misunderstands the nature of the relationship between the documents.

The certificate is merely a record confirmation, routinely created consistent with statutory law, that the notice has been sent to the driver. The notice contains the "substance" that the driver is suspended, explaining the basis and the duration. The notice was an "order of action" informing Nunley that he was revoked through

June 26, 2010 because of his new conviction for operating while intoxicated on June 2, 2009. See Joint Appendix, Notice of Order of Action, p 14a.

The certificate indicates that this notice was sent on June 22, 2009, Certificate of Mailing, p 16a, and the crime here did not occur until September 9, 2009 when he was stopped while driving. The crime was committed two months after this certificate was created. At the time of its creation, there was no reason to believe that the particular certificate would be used later at trial. No crime had yet occurred. The other state courts have reached the same conclusion in determining that this distinction is pivotal. See, e.g., *Commonwealth v Parenteau*, 460 Mass 1; 948 NE2d 883, 891 (2011) ("If such a record had been created at the time the notice was mailed and preserved by the registry as part of the administration of its regular business affairs, then it would have been admissible at trial."). The primary purpose of the notice cannot be to prosecute crime, when no crime has occurred. The entire endeavor of the notification process is to forestall crime from occurring.

B. The certificates' initial and ordinary purpose is an administrative one, and is not exclusively criminal.

Nunley makes two arguments in arguing that the "sole" purpose in maintaining the certificates is for prosecution under MCL 257.212. These arguments are both unavailing.

First, Nunley argues that there is no obligation to maintain the notice as contrasted with the certificate. Nunley's Brief, p 21. But Nunley misunderstands the relationship between the notice and the certificate.

The obligation of maintaining notice arises from MCL 257.204a(1)(h), which requires the maintenance of "notice given" by the Secretary of State. Nunley correctly notes that this statute does not address the "certificate"; however, there is no way to verify administratively that "notice" has been given if only the notice itself is maintained. The point is an obvious one.

Second, Nunley argues that the MCL 257.204a(1)(h) is limited to non-residents under MCL 257.317(3) and (4). But this reading of the statutory provision conflicts with the traditional rule of construction, known as the Last Antecedent Rule, which applies the modifying phrase to the immediate phrase, and not to earlier objects. See *Sun Valley Foods Co v Ward,* 460 Mich 230, 237; 596 NW2d 119 (1999). In the absence of applying this rule of construction, the statute would have the unexpected effect that notices to only non-residents are maintained. The majority decision in *Nunley* below also construed this provision this way. See *Nunley*, slip op, p 8 ("MCL 257.204a(1)(h) requires the maintenance of 'notices'").

Moreover, there are other non-criminal purposes for maintaining the certificates. They may be used for internal administrative purposes, i.e., to ensure that employees are meeting their job responsibilities of sending the notices, and may have external administrative uses in driver's license restoration actions. They may also be sought by third parties who are employers, e.g., hiring bus drivers, or for third party civil litigation. Finally, where there are more than 850,000 such notices and certificates, and only a relatively small number of criminal

prosecutions, the certificate cannot be serve an exclusive criminal purpose where the initial and ordinary function records the notice and there is no later crime.

III. *Fackelman* does not require a different result.

Nunley notes the decision in *Fackelman* identified "foreseeability" as of the core classifications of "testimonial" statements under *Crawford*. Nunley's Brief, p 35. But this analysis fails to address that the predicate to this point is that the statement at issue was made *after* the crime had occurred.

The timing of the statement is essential, because there is no "reason[ ] to believe that the statement would be available for use at a later trial," see *Crawford,* 541 U.S. at 51-52, when the statement was made before any crime was committed. The context and circumstances are relevant, if not determinative, considerations. *Fackelman,* 489 Mich at 560. Under this standard, there is nothing testimonial about the routine maintenance of certificates, created by the hundreds of thousands each year, where there is no crime or litigation, consistent with Michigan's statutory obligations. As an example of this point, the fact that it is foreseeable that a birth certificate may be evidence that is used at trial, e.g., to demonstrate that the rape victim was under age, does not mean that the creation of the document is testimonial. The context and circumstances show that the statements at issue here are non-testimonial.

CONCLUSION AND RELIEF REQUESTED

This Court should reverse and remand.

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